Illinois Environmental Protection Agency · 2200 Churchill Road, Springfield, IL 62706

MEMORANDUM

EPA Region 5 Records Ctr.
360697

DATE: December 7, 1984

TO: Gary King, Bob Kuykendall and Roger Kanerva

FROM: Phil Van Ness

SUBJECT: AMOCO/Recommended Policy Regarding Inactive Pre-RCRA Landfills at which "Significant Management Activity" Occurs

Background

In 31(d) discussions with representatives of AMOCO, we have been insisting on the need for compliance with interim RCRA requirements (specifically, Subparts F and N) by a HW landfill in Wood River which AMOCO asserts was closed on or before 11/19/80, but which the parties agree was the subject of corrective management action in 1981. There is no issue between the parties as to whether disposal (as opposed to storage) has taken place at the site. There is no issue as to whether wastes were received at the site after 11/19/80 (they were not). There is issue between the parties as to whether installation of a slurry wall (cost: $2,000,000) and other remedial actions taken by AMOCO in mid-1981 in response to a management directive is a "significant management activity" within the meaning of an 8/17/83 guideline memorandum from John Skinner, Director, Office of Solid Waste, USEPA (attached). Mr. Skinner's memo states that RCRA ISS requirements do not apply to a HW disposal facility closed before 11/19/80 "unless the owner or operator engaged in significant management activities after November 19, 1980" (emphasis added).

I have also reviewed two other USEPA guidance documents relied upon by FOS and found them to be of no particular relevance. One is a memo re: the Environmental Defense fund v. Lamphier case by Mr. Skinner dated 11/29/83; it is not relevant to this discussion because it deals with the "storage" vs. "disposal" distinction, which is not at issue here. The other is a 7/13/84 memo by Lee M. Thomas, Acting Assistant Administrator of USEPA, re: post-closure permits; it arguably is not relevant because it deals solely with sites which close and/or receive HW after January 26, 1983. It appears none of the three possible scenarios outlined in this memo cover the situation at AMOCO, where the site was last used for disposal before 1/26/83. I use the term "last used for disposal" rather than "closed" in deference to the language of Mr. Skinner's 8/17/83 memo in which he states the test of applicability of RCRA ISS regulations as being dependent on whether "the placement of wastes" in a surface impoundment on waste pile before 11/19/80 "constituted final disposal" (meaning there was no intent or design to do anything more to the waste in the nature of treatment, storage or disposal "elsewhere"). I therefore conclude that landfills last used for the placement of hazardous wastes before 11/19/80 are deemed to be "closed" by USEPA.

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In conclusion, only Mr. Skinner's 8/17/83 memo is clearly germane to the issues presented in AMOCO's case. Further, Mr. Skinner's guidance envisions that some old HW landfills will be "grandfathered" out of the RCRA system (i.e., deemed to be "closed") even though they have not been closed in accordance with RCRA. In such cases, Mr. Skinner advised, "EPA can rely upon either Section 7003 of RCRA or Superfund to mitigate any adverse impacts" of such landfills. The only exception to this "grandfathering out" principle is where "*significant management activities*" occur after 11/19/80.

The extent of that exception is in part determined by the meaning of "significant management activity".

"Significant Management Activity"

This term is, of course, not found or defined in any U.S. or Illinois statute or regulation, nor is a partial definition of "management" to be found. The definition of "HWM Facility" (35 IAC 702.110) essentially equates "management" with "treating, storing or disposing" by implication; however, the definitions of those 3 respective terms are unilluminating since no mention of any management-type function is made. The term, "management" is defined in the Webster's New Collegiate Dictionary (2d Edition) as "judicious use of means to accomplish an end", suggesting concerted action to effect a design or plan. "Significant" is defined as "important; momentous" and "containing some ... special meaning", suggesting something which is non-routine. Read together in the context of the purpose of environmental legislation and regulation (See Section 1(b) of the Illinois Act), the terms must be construed as meaning a concerted action of particular import undertaken to accomplish the end of environmental protection.

Utilizing this test, it is clear that the installation of expensive devices to control and prevent pollution at a site previously deemed closed, requiring months of work and preparation, is neither routine nor insignificant (and is thus of "particular import") and is the result of concerted activity designed to accomplish managerial goals (the control of environmental pollution and the minimization of potential liability for pollution-related problems). In short, AMOCO's 1981 actions constituted "significant management activity". It follows that the RCRA ISS requirements apply to AMOCO's landfill pursuant to Mr. Skinner's memo. The real issue is, to what extent do they apply?

What Permits are Needed?

As noted above, RCRA standards do not become applicable to a pre-RCRA inactive landfill until "significant management activity" occurs. Thus, for a time after November 19, 1980, there was no RCRA connection to the AMOCO landfill. Once "significant management activity" took place, however, the RCRA interim status standards applied (per Mr. Skinner). Consequently, by operation of 35 IAC 703.150(a)(2), AMOCO was obliged to file a Part A permit application for the landfill within 30 days of the "significant management activity" - in

other words, sometime in late 1981 or early 1982. Note that 35 IAC 703.150(c) provides an "escape clause" allowing for late filing of a Part A application where the Board, in response to a variance petition, finds there has been "substantial confusion" as to whether the site required a Part A permit, and where such confusion resulted from ambiguities in 35 IAC 720, 721 or 725. This could probably be alleged by AMOCO in this case.

There is nothing in the regulations to suggest a Part B permit will be needed for this landfill, given its date of last use, unless the "significant management activity" acts to "open" the landfill. More on that point later.

Which Non-Permit Standards Apply?

At first blush, Mr. Skinner's memo suggests that "significant management activity" at a site triggers all Part 725 requirements. This may be so. However, in a case such as this, it appears that many requirements of Part 725 would be inappropriate. For example, Subparts C and D require owners and operators to attempt to enter into agreements with local police and fire departments regarding potential emergencies and other contingencies, to develop, maintain and update a contingency plan for such eventualities (and submit a copy of same to all local police departments, hospitals, fire departments and emergency response teams which might be affected), and to appoint an Emergency Coordinator; these are all proper functions for active, rather than inactive, sites. Subpart E requires adherence to the manifest system, maintenance of an operating record and submittal of an annual report to the Director, which again are appropriate requirements for an active facility but not for one which has been inactive for over four years. Subpart G requirements regarding closure and post-closure would have required preparation of written closure and post-closure plans by May 19, 1981, even though the site arguably was not subject to RCRA regulations (state or federal) at that time, per Mr. Skinner's directive. Moreover, a closure plan, per 35 IAC 725.212(b) can only be submitted prior to closure and can only be amended during the active life of the facility; in AMOCO's case, these conditions would be impossible to perform.

In sum, if ISS requirements are to be applied to AMOCO as a consequence of "significant management activity" taking place in 1981, those requirements will have to be construed as appropriate to AMOCO's situation; regulatory deadlines and compliance timetables particularly will have to be administratively revised to accomodate the passage of time and the resulting impossibility of performance by AMOCO of the literal requirements of Part 725. For this, a formal variance from Board regulations may be required.

Options

Mr. Skinner's memorandum obviously does not address the practical problems inherent in the "significant management activity" doctrine. In confronting these problems in actual cases, the Agency must deal with two issues, namely

the appropriate breadth of applicability of ISS regulations in a given case and the resulting effect of that specific decision upon the overall RCRA scheme.

An obvious option is to simply apply Part 725 in toto to sites like AMOCO's, with liberal manipulation only of specified regulatory deadlines. This ensures consistency with the program. It also opens a Pandora's Box for us and the regulated community and provides industry a powerful incentive to take no remedial activity which conceivably could be denominated a "significant management activity". One practical effect will be to bring scores of old inactive sites into the RCRA system, complete with attendant reports, public hearings, permits, retroactive facility operation and design standards - many of which could not be met by old sites - and recordkeeping requirements of doubtful value.

Another option is to apply Part 725 requirements piecemeal, selecting and applying only those Part 725 requirements which seem conducive to the purposes to be served given the affected site's particular circumstances. Actually, this would result in a range of options reflecting varying situations. In AMOCO's case, the Agency could justifiably apply only the post-closure requirements of Subparts G and H, on the theory that "closure" of a pre-RCRA site (one in which no wastes were deposited at the site after November 19, 1980) need not comport with closure requirements of RCRA and that a "significant management activity" other than placement of additional wastes in the facility does not "re-open" the site or otherwise alter the site's status as a "closed" facility. Under this line of reasoning, the effect of the 1981 activity by AMOCO is to make the facility subject to the post-closure requirements of Subparts G and H (Sections 725.217-725.220, 725.244-725.245 and all Sections referenced therein). That would mean that AMOCO would be subject to 30 years' post-closure care consisting of at least a groundwater monitoring and reporting program comporting with Subpart F requirements, maintenance of the landfill cover and leachate collection system pursuant to applicable portions of Subpart N (referenced in Section 725.217(a)(2)), and provision of financial assurances for post-closure. These requirements may be somewhat onerous to AMOCO, but they are far less onerous than applying all of Part 725 - and possibly by extension, post-closure permit requirements of Section 703.121(b) and Part 724 (or the federal equivalents, 40 CFR Part 264 and Section 270.1(c)). More importantly, these post-closure requirements, construed to reflect the appropriate changes to regulatory deadlines - reset by the Board in a variance action - best address the Agency's real concerns regarding the lack of an adequate Subpart F monitoring program and the lack of adequate assurances regarding site maintenance. Little, if any, adverse effects upon the RCRA system are anticipated.

Recommendation

Obviously, I prefer the limited, "piecemeal" approach to applying ISS requirements in cases such as this. However, it is vital to coordinate Agency policy with USEPA and the regulated community. I recommend that the Agency stake out its recommended position on this issue along the lines I have indicated, and that the Agency then meet with AMOCO and USEPA Region V representatives for purposes of settling upon an agreed coordinated policy.

Attachment

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cc: Scott Phillips
Ken Mensing
File 7341-HAZ